

No. 12127

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BURNS STEAMSHIP COMPANY, a corporation, and
ASSOCIATED INDEMNITY CORPORATION,
a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner 13th
Compensation District, Bureau of Employees Com-
pensation, Federal Security Agency and ANNA
ANDERSON,

Appellees.

TRANSCRIPT OF RECORD

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

JAN 20 1949

PAUL R. O'BRIEN,
CLERK

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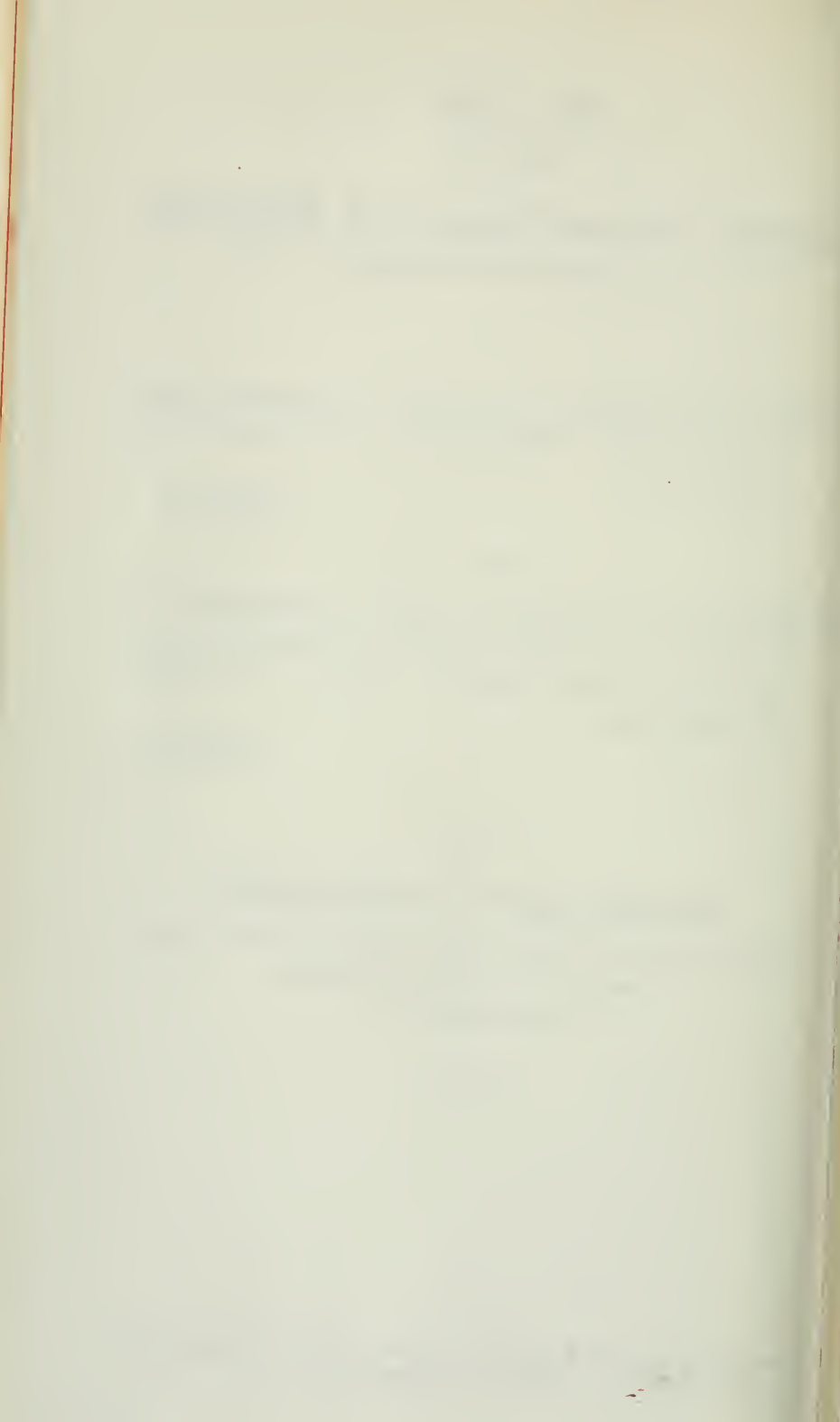
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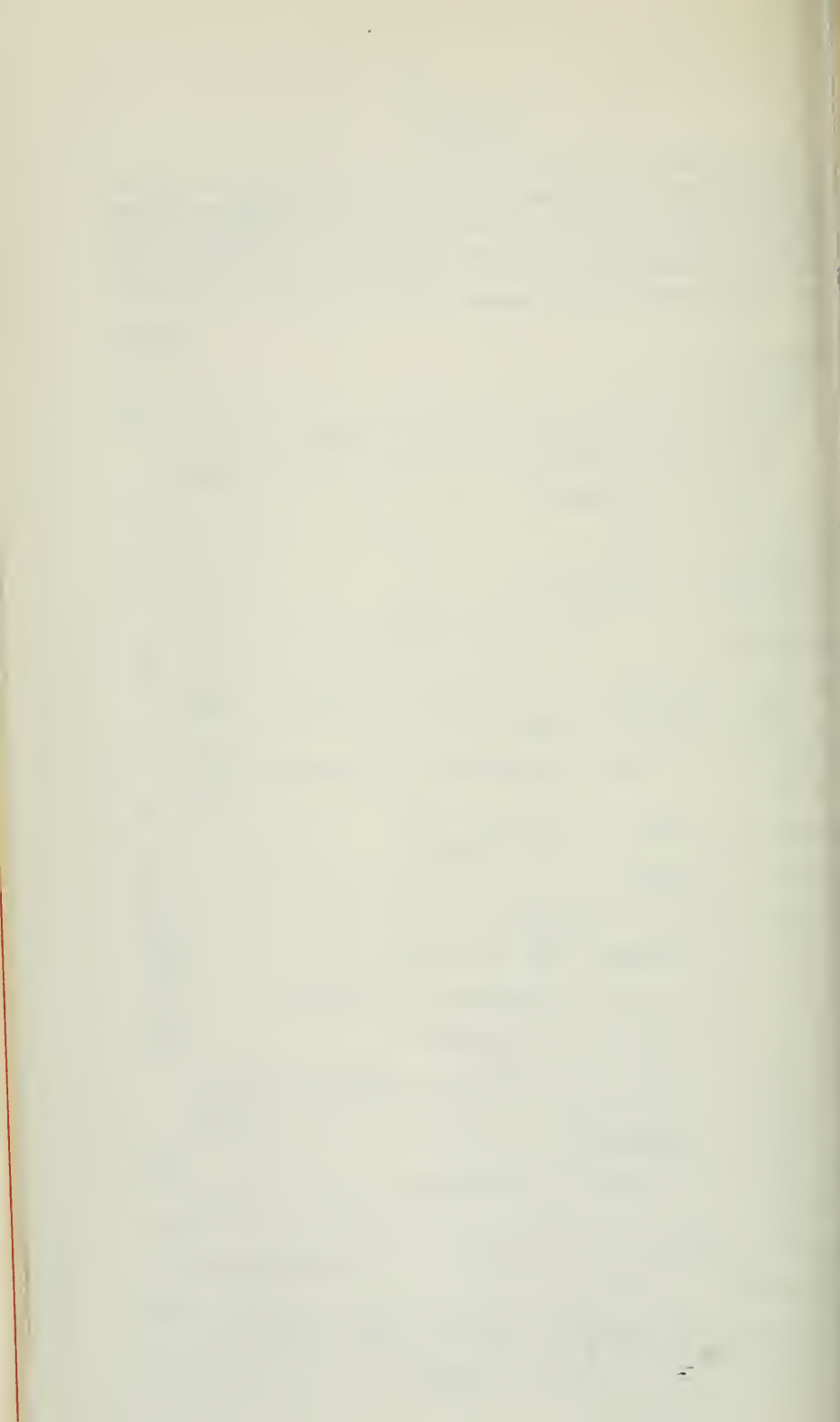
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

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United States Attorney

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For Appellee Anderson:

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San Pedro, California [1*]

*Page number appearing at foot of Certified Transcript.

In the District Court of the United States
Southern District of California

Central Division

No. 8075-BH

BURNS STEAMSHIP COMPANY, a corporation, and
ASSOCIATED INDEMNITY CORPORATION,
a corporation,

Plaintiffs

vs.

WARREN H. PILLSBURY, as Deputy Commissioner
13th Compensation District, Bureau of Employee
Compensation, Federal Security Agency; and ANNA
ANDERSON,

Defendants.

COMPLAINT FOR INJUNCTION

Plaintiffs complain of defendants, and for cause of
action allege as follows:

I.

Jurisdiction is founded on the existence of the question arising under Title 33 U. S. Code, Section 921, 44 Stat. 1436, as amended, 49 Stat. 1921.

II.

The plaintiff Burns Steamship Company is, and at all times mentioned herein was, a corporation duly organized and existing under the laws of the State of California and doing business within the judicial district in which this complaint is filed.

Plaintiff Associated Indemnity Corporation is, and at all [2] times herein mentioned was, a corporation duly organized and existing under the laws of the State of California and authorized to do an insurance business in the State of California. At all times herein mentioned, said Associated Indemnity Corporation was the insurance carrier for the plaintiff Burns Steamship Company for the liability arising under the Longshoremen's and Harbor Works' Compensation Act, Act of March 4, 1947, 44 Stat. 1424, 33 U. S. Code 901 to 950.

III.

On November 29, 1947, plaintiff Burns Steamship Company was the employer of one John A. Anderson, the husband of the defendant Anna Anderson. On said date, said John A. Anderson sustained an injury in this judicial district, to-wit: in the Southern District of California, which said injury resulted in the death of said John A. Anderson.

IV.

At the time of the injury and death of said John A. Anderson, as described in paragraph III, the said John A. Anderson was an employee of the plaintiff Burns Steamship Company.

V.

The facts and circumstances preceding the injury and death of said John A. Anderson, as described in paragraph III, are set forth in narrative fashion in the Findings of Fact made by defendant Warren H. Pillsbury, as Deputy Commissioner of the 13th Compensation District,

Bureau of Employees Compensation, Federal Security Agency, a copy of said Findings of Fact and the Award made thereon is annexed to this complaint and marked Exhibit "A", and incorporated herein by reference with the same force and effect as if set forth in full.

VI.

On or about February 27, 1948, defendant Warren H. Pillsbury [3] made the Findings of Fact and Award in this case, a copy of which is attached to this complaint and marked Exhibit "A", which said Award directed the plaintiffs herein to pay to the defendant Anna Anderson, the sum of Two Hundred Dollars (\$200.00) as burial expense, payable to McNerny's mortuary, and Thirty-four Dollars (\$34.00) to said defendant Anna Anderson. Said Award further provided for the payment of \$163.19 forthwith to said Anna Anderson, and the further sum of \$13.13 per week, payable in installments every two weeks, or monthly, at the election of said defendant Anna Anderson, until further order of the Deputy Commissioner, subject, however, to a lien in favor of Grover Johnson, attorney for said Anna Anderson, in the sum of One Hundred Twenty-five Dollars (\$125.00), payable directly to said attorney.

This complaint will be filed within thirty days after the date of said Award, in accordance with the provisions of Section 921(2) of Title 33 U. S. Code.

VII.

Plaintiffs contend that the Findings and Award, a copy of which is annexed to this complaint and marked Ex-

hibit "A", are not in accordance with the law and are beyond the jurisdiction of the defendant Warren H. Pillsbury, as Deputy Commissioner of the 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency, in that the injury and death of the said John A. Anderson was not an accidental injury or death arising out of and in the course of employment, within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, and particularly, Section 902(2) and Section 909 of said Act. Plaintiffs contend that the undisputed and uncontradicted evidence taken by the said defendant Deputy Commissioner established that the said John A. Anderson was injured and killed as a result of his own misconduct, in that he violated an instruction of the ship's mate, his superior officer, by directing a sling load of [4] coal to be brought on board ship. Plaintiffs contend that the Findings and Award in this case were not based upon substantial evidence, and were based upon mere surmise of the said defendant Deputy Commissioner. In this connection, the plaintiffs quote the following pertinent part of the Findings of the said defendant Deputy Commissioner:

"The sling load swung against him, causing injuries from which he died the same day. He had been previously requested by the ship's mate, a superior officer, to let such sling load of coal remain on the dock that it might be brought on board later by members of the ship's crew who would operate winches at the next hatch. The reasons for his disregarding said request are not known, although it may be surmised that he did so in order to obtain the sling in which said coal had been placed for the purpose of using it to discharge some waste and scrap

wood on the deck to the dock, an act permitted by the employer; that the act of bringing said coal on board was within the general scope of his duties in that it was part of his work to direct winches in the loading and unloading of the ship, including occasional loading of ship's stores, and that his failure to comply with said direction of the mate was an act of minor disobedience in the course of his work and not an act taking himself outside the scope and course of his employment; * * *." (Underscore supplied.)

VIII.

Plaintiffs have no adequate remedy at law against the said Findings and Award, and this injunction proceeding is the exclusive and only remedy allowed by the said Longshoremen's and Harbor Workers' Compensation Act, Section 921(d).

Wherefore, plaintiffs demand:

1. That defendants be enjoined by appropriate process of this Court to show cause why a permanent injunction should not be granted to plaintiffs restraining the defendants from enforcing the aforesaid Award.

2. A judgment and decree of this Court establishing that the aforesaid Award is and was not in accordance with law, and is and was beyond the jurisdiction of the defendant Deputy Commissioner.

3. For such other and further relief as shall be just and equitable.

SYRIL S. TIPTON and
PATRICK H. FORD

By Patrick H. Ford

Attorneys for Plaintiff [6]

EXHIBIT "A"

FEDERAL SECURITY AGENCY
BUREAU OF EMPLOYEES COMPENSATION
13th Compensation District

In the Matter of the claim for compensation under the
Longshoremen's and Harbor Workers' Compensation
Act.

ANNA ANDERSON, Widow of JOHN A. ANDER-
SON, Deceased

Claimant

against

BURNS STEAMSHIP COMPANY,

Employer

ASSOCIATED INDEMNITY CORP.

Insurance Carrier

COMPENSATION ORDER—AWARD OF DEATH
BENEFIT

Case No. 3022-41

Claim No. 2978

Such investigation in respect to the above entitled claim
having been made as is considered necessary and a hear-
ing having been duly held in conformity with law, the
Deputy Commissioner makes the following:

FINDINGS OF FACT

That on the 29th day of November, 1947, John A. An-
derson, husband of the claimant herein, was in the em-
ploy of the employer above named at Los Angeles Harbor
in the State of California, in the 13th Compensation Dis-
trict, established under the provisions of the Longshore-

men's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Associated Indemnity Corp.; that on said day the said John A. Anderson while performing service for the employer as a longshoreman and engaged stevedoring operations on the "SS Daisy Gray" afloat on Navigable waters of the United States at said harbor sustained personal injury occurring in the course of and arising out of his employment and resulting in his death the same day as follows: [7] The said employee, while acting as hatch-tender, was signalling the bringing on board by the ship's winches of a swing load of coal for use in ship. The sling load swung against him, causing injuries from which he died the same day. He had been previously requested by the ship's mate, a superior officer, to let such sling load of coal remain on the dock that it might be brought on board later by members of the ship's crew who would operate winches at the next hatch. The reasons for his disregarding said request are not known, although it may be surmised that he did so in order to obtain the sling in which said coal had been placed for the purpose of using it to discharge some waste and scrap wood on the deck to the dock, an act permitted by the employer; that the act of bringing said coal on board was within the general scope of his duties in that it was part of his work to direct the winches in the loading and unloading of the ship, including occasional loading of ship's stores, and that his failure to comply with said direction of the mate was an act of minor disobedience in the course of his work and not an act taking himself outside

the scope and course of his employment; that notice of injury was given within thirty days after the date of such injury to the Deputy Commissioner and to the employer; that the average weekly earnings of the employee herein at the time of his injury amounted to \$59.58; that the reasonable expense of the burial of the said employee was over \$200.00; that claimant has paid thereon \$100.00; that there is still due to the Funeral Director providing said burial service McNerny's Mortuary the sum of \$166.00 thereon and therefor defendants are liable to claimant in said sum of \$200.00 payable in the said sum of \$166.00 on her account to McNerny's Mortuary and the balance of \$34.00 to claimant; that Anna Anderson, Claimant herein, born September 1st, 1892, widow of said employee, was living with him and supported by him [8] at the time of his death and is entitled to a death benefit at the rate of \$13.13 a week, payable in installments either each two weeks or monthly at her election beginning November 30th, 1947, until the further order of the Deputy Commissioner, subject to the limitations as to maximum payment and period of payment contained in said Act, amount accrued to and including February 24th, 1948 12-3/7 weeks is \$163.19 no part of which has been paid; that claimant's attorney Grover Johnson, has rendered legal service to claimant in the prosecution of her claim for which a fee is approved in the sum of \$125.00 and lien is granted therefor upon compensation awarded.

Upon the foregoing facts, the Deputy Commissioner makes the following:

AWARD

That the employer, Burns Steamship Company, and the insurance carrier, Associated Indemnity Corp., shall pay to the claimant compensation as follows:

The sum of \$200.00 forthwith upon the burial expense, payable \$166.00 to McNerny Mortuary on her account, and \$34.00 to claimant.

To claimant the sum of \$163.19 forthwith as of February 24th, 1948 and the further sum of \$13.13 weekly thereafter, payable in installments each two weeks or monthly at her election until the further order of the Deputy Commissioner, subject, however, to a lien therein in favor of the claimant's attorney Grover Johnson in the sum of \$125.00, payable directly to said attorney.

Given under my hand at San Francisco, California, this 27th day of February, 1948.

(Signed) WARREN H. PILLSBURY
Warren H. Pillsbury
Deputy Commissioner
13th Compensation District

WHP:MI

[Endorsed]: Filed Mar. 23, 1948. Edmund L. Smith,
Clerk. [9]

[Title of Court and Cause]

NOTICE OF MOTION TO DISMISS COMPLAINT
OR FOR SUMMARY JUDGMENT AND MO-
TION TO DISMISS COMPLAINT OR FOR
SUMMARY JUDGMENT AND MEMORAN-
DUM OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS COM-
PLAINT OR FOR SUMMARY JUDGMENT

To: The Plaintiffs above named and to Cyril S. Tipton
and Patrick H. Ford, their attorneys:

You and Each of You Will Please Take Notice that the
undersigned will bring the above motion on for hearing
before the above entitled Court in the Courtroom of the
Honorable Ben Harrison, United States District Judge,
in the United States Post Office and Court House Build-
ing, 312 North Spring Street, Los Angeles 12, California,
on Monday, the 23rd day of August, 1948, at 10:00
o'clock in the forenoon of that day or as soon thereafter
as counsel can be heard.

Dated: This 7 day of August, 1948.

JAMES M. CARTER

United States Attorney

CLYDE C. DOWNING

Asst. U. S. Attorney

Chief of Civil Division

By Leila F. Bulgrin

Asst. U. S. Attorney

Attorneys for Defendant, Warren H. Pillsbury,
etc. [13]

MOTION TO DISMISS COMPLAINT OR FOR
SUMMARY JUDGMENT

Now comes the defendant, Warren H. Pillsbury, as Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency, by his attorneys, James M. Carter, United States Attorney for the Southern District of California, Clyde C. Downing, and Leila F. Bulgrin, Assistant United States Attorneys for the Southern District of California, and move this Court to dismiss the complaint or for summary judgment for the following reason and ground:

I.

That the complaint filed in the above entitled case fails to state a claim upon which relief can be granted.

This motion is based and will be based upon the records, files, and pleadings herein and upon the Memorandum of Points and Authorities attached hereto.

Dated: This 7 day of August, 1948.

JAMES M. CARTER

United States Attorney

CLYDE C. DOWNING

Asst. U. S. Attorney

Chief of Civil Division

By Leila F. Bulgrin

Asst. U. S. Attorney

Attorneys for Defendant, Warren H. Pillsbury,
etc. [14]

[Verified.]

[Endorsed]: Filed Aug. 7, 1948. Edmund L. Smith,
Clerk. [15]

Federal Security Agency—Bureau of Employees
Compensation

Before Warren H. Pillsbury, Deputy Commissioner
13th Compensation District

Claim No.

Case No. 3022-41

MRS. ANNA ANDERSON, Widow of John A. Ander-
son, Deceased,

Claimant,

vs.

BURNS STEAMSHIP COMPANY,

Employer,

ASSOCIATED INDEMNITY CORP.,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY AT HEARING

Pursuant to notice, this matter was heard before
Warren H. Pillsbury, Deputy Commissioner, Bureau of
Employees Compensation, Federal Security Agency, in
the Conference Room, Longshoremen's Dispatching Hall,
343 Broad Street, Wilmington, California, on Tuesday,
December 16, 1947, at 2:15 o'clock P.M.

Appearances:

Claimant present in person and represented by Grover
Johnson, Attorney at Law.

Defendants represented by Cyril S. Tipton, Attorney
at Law. Murray H. Roberts, Attorney at Law, appeared
for Aetna Insurance Company. [17]

* * * * *

Mr. Pillsbury: Hearing on my initiative, on the request of claimant's attorney, Mr. Grover Johnson, to take up the death of John A. Anderson on November 29, 1947, on the S.S. Daisy Gray. Claimant, Anna Anderson, is present in person and represented by Grover Johnson, Attorney at Law. Defendants S.S. Daisy Gray and Burns Steamship Company, with their insurance carrier, Associated Indemnity Company, represented by Mr. Syril Tipton, Attorney at Law. Defendant Aetna Insurance Company is represented by Murray H. Roberts, Attorney at Law.

Mr. Roberts: May I be excused then? I have exhibited to you and the counsel involved here the exclusion in the I.D. policy issued by the Aetna Insurance Company covering the operations of the S.S. Daisy Gray, and attached to that policy was an endorsement which excluded coverage which pertains to longshoremen's compensation or any employee or employer relationship excepting members of the crew, and I would like to be dismissed. I suppose there is no claim against the Aetna people at this time.

I will see to it that the proper notification is sent to you, Mr. Pillsbury, about the insurance certificate which has heretofore been filed.

Mr. Pillsbury: The explanation of the inclusion of the Aetna Insurance Company is that when I received Mr. Johnson's letter in my office a search was made in my insurance file, [18] containing card certificates of policies issued under the Longshoremen's and Harbor Workers' Compensation Act. This showed a card certificate that the employer of the ship at the time of the injury herein involved was insured in the Aetna Insurance Company.

The employer's first report, which however is privileged against introduction in evidence, showed the Associated Indemnity Company as the insurance carrier and I did not discover a card certificate of the insurance from this carrier.

However, Mr. Tipton, you are willing to stipulate, as I understand, that the Associated Indemnity Company was the insurance carrier of the S.S. Daisy Gray and owners, Burns Steamship Company, managing owners, on and about November 29, 1947, under the Longshoremen's and Harbor Workers' Compensation Act, are you?

Mr. Tipton: That is right.

Mr. Pillsbury: And you do not claim that the Aetna Insurance Company was also the insurance carrier?

Mr. Tipton: I have no information to the effect that they are.

Mr. Pillsbury: Then Mr. Roberts, I will drop the Aetna.

Mr. Roberts: And I will notify the Aetna to clear your records on that insurance. May I be excused?

Mr. Pillsbury: Yes.

Claim for death benefit is filled out by Mr. Johnson for [19] claimant, signed by her, oath taken before me, received and ordered filed. Mr. Tipton, are you satisfied to proceed today to hearing on the claim?

Mr. Tipton: Yes, I think so.

Mr. Pillsbury: Ten days notice is therefore waived.

(Discussion off the record.)

Mr. Pillsbury: Pre-hearing conference has been held which indicated that the defendants would not accept liability without hearing, relying on issues previously raised in a controversion notice filed with me and dated December 8, 1947, raising the grounds of, first, degree

of dependency, and second, whether the injury arose out of and occurred in the course of employment.

The following facts are agreed to by the parties:

1. John A. Anderson, husband of the claimant herein, was in the employ of defendant S.S. Daisy Gray and owner Burns Steamship Company, at San Pedro, California, on and about November 29, 1947, as the winch driver and hatch tender, and at said time said employer was insured against liability under the Longshoremen's and Harbor Workers' Compensation Act by insurance in defendant Associated Indemnity Company.

2. That he met with fatal injury on said date on said vessel.

3. That the claim is within the provisions of said Act.

4. Medical treatment was not required. [20]

5. Defendants had actual knowledge of the occurrence of said fatal injury at the time thereof.

6. That the wages of the said employee at said time were over \$37.50 a week, the actual amount to be fixed by wage statement which is now received in evidence as Exhibit A.

7. That no compensation has been paid.

8. That death resulted the same day.

Mr. Anderson, you have stated in your verified claim that the amount of the undertaker's bill for the burial of your husband was \$416.00, is that correct?

The Claimant: Yes.

Mr. Pillsbury: And \$150.00 was paid on the bill by the union?

The Claimant: Yes.

Mr. Pillsbury: And you paid \$100.00 on the bill, did you?

The Claimant: Yes.

Mr. Pillsbury: And the balance of \$166.00 is still owing by you?

The Claimant: Yes.

Mr. Pillsbury: All right.

Mr. Tipton: Where was the burial?

The Claimant: McNerny, on 5th Street, McNerny's Mortuary, 5th Street.

Mr. Pillsbury: Claimant exhibits a marriage certificate and an interim marriage certificate, both dated the same day, [21] which are inspected by defendants and returned to claimant.

Mrs. Anderson, I will take your testimony and I will swear you again.

MRS. ANNA ANDERSON,

claimant, being first duly sworn, testified as follows:

Mr. Pillsbury: Q. Your name is Anna Anderson?

A. Yes.

Q. Speak so we can all hear. And you live at 542 West 3rd Street, San Pedro?

A. I do; renting there.

Q. According to your verified claim you were married to John Anderson on May 21, 1941 at Yuma, Arizona? Is that correct?

A. Yes.

Q. Is that the John Anderson who died on the 29th of November, 1947?

A. Yes.

Q. And are you the person named in the marriage certificate as Anna H. Koehler?

A. Yes, I was a widow at that time.

Q. You are the person who married Mr. Anderson under the name of Anna H. Koehler?

A. Yes.

Q. Was there any divorce or separation afterwards?

A. I was a widow. [22]

Q. Were you living with him at the time of his death?

A. I was.

Q. There were no children of the marriage?

A. No.

Mr. Pillsbury: Any questions, Mr. Johnson?

Mr. Johnson: Q. At the time of Mr. Anderson's death you were wholly dependent upon his support?

A. Yes.

Mr. Pillsbury: The fact of living together creates a conclusive presumption of dependency.

Mr. Tipton, any questions?

Mr. Tipton: Q. How had your prior marriage been terminated?

A. I was a widow at the time I married Mr. Anderson.

Q. Had your previous husband died, or were you a widow by virtue of divorce?

A. No, he had died.

Q. What was his name?

A. Albert W. Koehler.

Q. That was Koehler? A. Yes.

Q. And where did he die?

A. He died here in Wilmington.

Q. When?

A. The latter part of January, was it 1935?

Mr. Anderson: 1935. [23]

Mr. Johnson: Let the witness testify. That is the son.

Mr. Pillsbury: Yes, she is the witness.

Mr. Tipton: Q. Do you know whether John A. Anderson had been married before?

A. No, he was not.

Mr. Tipton: I think that is all.

Mr. Pillsbury: Now, Mr. Tipton, what is your contention with reference to the question of course of employment?

Mr. Tipton: Our contention is that at the time this accident happened Mr. Anderson had taken upon himself to order a certain sling of coal thrown on board for the purpose of releasing that sling to be used in the unloading of lumber scraps from the deck to the dock for a Mrs. Hamilton, and that he was instructed that could not be done, and the unloading of this lumber was not a part of his duties and was in the course of his trying to unload this lumber for Mrs. Hamilton.

Mr. Pillsbury: Will you take the next chair, Mrs. Anderson, please? Mr. Johnson, have you any witnesses?

Mr. Johnson: No, I did not bring any. I did not anticipate this defense.

Mr. Pillsbury: I will give you as much more time as you wish to complete your evidence.

There are some eye witnesses present apparently. Call any eye witnesses, Mr. Tipton. [24]

Mr. Tipton: Am I to understand that the applicant's case is closed, or are they to have the opportunity of producing further testimony?

Mr. Pillsbury: To have the opportunity of producing further testimony. The applicant is apparently taken by surprise by the nature of the issue raised.

Mr. Tipton: I do not think so for the reason he was served a copy of our notice of contention which set forth that would be one of the issues.

Mr. Johnson: I never received such a notice. This is the first I have heard anything about it.

Mr. Pillsbury: Nevertheless I wish to get to the bottom of the question and get the facts.

Mr. Tipton: I am not sure; I thought it had, but I have no note to show whether it was or was not. I am not making any assertion you got a copy. Mr. Bliss.

ERNEST L. BLISS,

being first duly sworn, testified as follows:

Mr. Pillsbury: Q. What is your name?

A. Ernest L. Bliss.

Q. Your address?

A. 1924 Caspian Avenue.

Q. What city? A. Long Beach.

Q. What is your occupation? [25]

A. Master, steam vessels.

Q. Were you the master on the S.S. Daisy Gray?

A. Chief mate. That is my rating, master.

Q. Were you the chief mate on the Daisy Gray at that time? A. Yes, I was.

Q. Did you know Mr. John Anderson?

A. Fairly good, yes.

Q. Did you see him sustain any injury on that date?

A. Yes.

Q. What did you see?

A. I saw him directly hit. I was just astern of him, saw him get hit with a load of coal.

Q. What hit him?

A. A sling load of coal.

Q. What was being done with it?

A. Being swung from the gangway to #2 hatch along the areaway on the port side.

Q. What was being swung?

A. The coal was swinging down the areaway toward Mr. Anderson at the time he got hit.

Q. Was that being loaded into the ship or taken out of the ship?

A. Being loaded into the ship, yes, from the dock into the ship.

Q. Yes. Then what happened to Mr. Anderson? [26]

A. Well, the load of coal hit him in the back of the head. It looked to me, I was astern of him, it spun him around and he landed on the coal by holding onto the coal.

Q. And did anything more happen?

A. No, that is all there was. Then we phoned for the ambulance.

Q. Was he unconscious after he was hit?

A. He was unconscious. I took his pulse and felt his heart, and got a blanket. That was all I could do. He was unconscious after it hit him.

Q. What was his occupation at that time?

A. Longshoreman winch driver.

Q. And it is the custom, is it not, that the winch driver and hatch tender shall change positions hour by hour?

A. Yes.

Q. What position was he occupying?

A. Hatch tender.

Q. Had he given the signal to raise the sling load of coal and place it aboard?

A. Yes.

Mr. Pillsbury: Mr. Tipton.

Mr. Tipton: Q. Mr. Bliss, did you have a conversation with Mr. Anderson some time before this incident occurred?

A. Yes, I did.

Q. Where was that? [27]

A. Just approximately the same location where he got hit.

Q. About how long was it before the accident happened?

A. Perhaps maybe seven or eight minutes, something like that.

Q. What was said in that conversation?

Mr. Johnson: We object to any conversation as hearsay and in the nature of evidence we are not in a position to meet.

Mr. Pillsbury: Objection overruled.

A. He asked me if he could use the sling that was on the dock—no, he asked first if I had an extra sling, a net sling, and I said no, the only sling there was on the ship was the one that was loaded on the dock at #2 with coal.

Mr. Tipton: Q. Go ahead.

A. So I told him that was the only one that was the one loaded with coal on the gangway by #2, so he says we will bring the coal on board. And I says, no, we cannot do that with the No. 1 gear because we have to take that on the starboard side, and it was portside to the dock, because the place where we load the coal is on the starboard side. We take some on the deck, and take some aloft on the saloon deck.

Mr. Pillsbury: Q. What was your position at that time?

A. Beside him at the dock.

Q. Your position? A. Chief mate.

Q. Of the Daisy Gray? [28] A. Yes.

Q. As such, what relationship of employer did you bear to Mr. Anderson? Was he working under your direction? A. Yes.

Mr. Pillsbury: Go ahead.

A. All right. So he asked why he couldn't take the load on board with the #1 gear and I explained it had to go on the starboard side, and I told him that the sailors

would take it on board with the #2 gear, which was idle, when they got through with the #3 gear.

Q. Which gear was Mr. Anderson working at?

A. #1. The #2 for the coal was laying idle and was winged in and could not be used without winging it out to bring any kind of a load in.

Q. Go ahead.

A. So after several minutes we were talking, we were not talking any further about the coal, he and I were talking about the trip, talking idly, and then I went aft. I went to #3 to check on the amount of lumber that was out, and I came back up.

Q. You have finished the conversation? A. Yes.

Mr. Tipton: Q. In that conversation was anything said about why he wanted to use that sling?

A. Yes, he wanted to do a favor, more or less, to a wife [29] of a man in the galley so she could take some random pieces of lumber in the slingload for her fireplace, and he was doing her a favor by trying to get a net sling to get the lumber off.

Q. Where was that lumber, on the deck?

A. On #2.

Q. On the ship? A. Yes.

Q. Do you know whether or not her name was Mrs. Hamilton? A. That is it.

Q. Subsequent to that conversation did you see the coal coming aboard?

A. Not until after I started walking forward again, which is just as the coal was being swung. I was almost there.

Q. And between the time you had talked to Mr. Anderson and told him that he could not swing this coal aboard, had you had any further conversation with him about it?

Mr. Johnson: We object to the question, misstatement of the question. There has been no testimony on the part of the witness he could not do it.

Mr. Tipton: Q. Subsequent to the conversation you had with Mr. Anderson about the movement of the coal which was in the sling, between that conversation and the time you saw it coming aboard, did you have any other conversation with Mr. Anderson? [30]

A. Not a bit.

Q. Now what, in your ordinary procedure, would have happened to that lumber which was to be taken by Mrs. Hamilton?

Mr. Johnson: We object to this. We are going to ordinary procedure, something hypothetical here, not material.

Mr. Pillsbury: You were in charge of the loading and unloading operations on the ship, were you?

A. Yes.

Mr. Pillsbury: Objection overruled.

Mr. Tipton: Q. Did you understand the question?

A. No.

Q. In the ordinary practice of the vessel what would have been done with this lumber on the deck that Mr. Anderson was going to swing to the dock for Mrs. Hamilton?

A. On ordinary practice it would have been carried over and loaded on #1 and taken by hand over to where—

Mr. Pillsbury: It was to be removed from the ship to the dock?

A. Yes, sir. That is right, between #1 and #2. They were little pieces of random lumber laid in between the hatches.

Mr. Tipton: Q. Now what is the custom insofar as loading and unloading ship's stores or anything of that type is concerned? Is that done by the longshoremen or by the crew? A. Done by the crew.

Q. And the longshoremen work only with cargo? [31]

A. That is right. That is strictly up to the company. There has been a little jurisdictional, a little dispute. The company has the right to hire longshoremen any time to take on stores, but under normal practice unless they state so it is to be taken aboard by the seamen. They only use that practice when they are taking on stores for four months or something like that.

Q. In the ordinary practice would this lumber have been taken from the deck to the dock by the crew or longshoremen?

Mr. Johnson: We will object to this testimony, ordinary practice or custom. The witness admits there is a dispute about it.

Mr. Pillsbury: Objection overruled.

Mr. Tipton: You may answer the question.

A. Would that lumber—it would stay on board or be given to somebody or be thrown over the side.

Mr. Pillsbury: The question was whether it would be taken off by the longshoremen or by the crew?

A. That is open to dispute. If some longshoreman or sailor asked me for it, it is just more or less a give-away of something that was not of any use.

Mr. Tipton: Q. Was there any custom as far as unloading it from the vessel?

A. It would only be the crew alone that would be throwing things overboard. [32]

Mr. Pillsbury: Q. It was to be taken off the vessel in any event? A. In time, yes, excess trash.

Mr. Tipton: Q. Would it have been taken off necessarily and put on the dock?

A. It might have been taken off at sea.

Mr. Pillsbury: Q. Might it have been taken off at the dock?

A. There is no common practice. If there is trash you throw it over or if someone wants it you give it to them. If no one wanted it then the sailors would throw it over the side at sea.

Q. And you worked two men on a hatch, one operates the winch and one is the hatch tender?

A. Hatch tender.

Q. Who was the winch driver at this time?

A. Henry Tornquist.

Q. Did you ever give him any instructions to bring that coal aboard? A. Never.

Mr. Tipton: You may cross-examine.

Mr. Johnson: Q. You didn't give orders for every sling load, did you?

A. No, I did not. We always have the two winch drivers working together.

Q. In other words, you indicate what goes on or off? [33]

A. The lumber that goes off is strictly up to them as long as they do not take more or less of some cargo than is supposed to go out, then I will stop them. The size of the load is jurisdictional.

Q. Coal was actually cargo that was to be taken on board the vessel and carried away?

A. Not cargo; stores, yes.

Mr. Pillsbury: Q. It was a commodity to be loaded on the ship, was it?

A. Commodity to be loaded aboard the ship as stores, yes.

Mr. Johnson: Q. Mr. Hamilton works on the Daisy Gray?

A. Yes, he does.

Q. In the galley, kitchen? A. Yes, galley.

Q. And Mr. Anderson told you that Mrs. Hamilton wanted some wood for her fireplace?

A. I will tell you how it came about. The day before he had been helping Mr. Hamilton take this lumber for Mrs. Hamilton, and he was fairly good friends with Mr. Anderson. The following day when he was looking—

Q. You were not an enemy of Mr. Hamilton?

A. Not a bit.

Q. So you raised no objection to Mrs. Hamilton getting the lumber?

A. No, I would like to see her have it. [34]

Q. So that as to this lumber, Mr. Anderson having told you that Mrs. Hamilton wanted it, you would have seen that at some time before you left the dock that it was removed from the ship to the dock for Mrs. Hamilton?

A. Not necessarily on that question. I would say that if any person wanted to throw it on the dock, which was not very far away, they could have taken it any way they could get it, throwing it over the side or any other practice by which they could have had it in safety, and so forth. I would have been glad for them to have it.

Mr. Pillsbury: Q. Did you consent to Mrs. Hamilton getting it?

A. She had been taking it for one day and I consented to that.

Q. You were agreeable?

A. Certainly, and I gave some to some longshoremen that wanted it just to get rid of it. It was scrap, broken pieces and all odd sizes.

Mr. Johnson: Q. Mr. Anderson was putting the coal on the side where you indicated it was to go?

A. No, he certainly was not.

Q. It was being swung from one side of the vessel to the other side, wasn't it? A. No, no.

Q. The sling load hit Mr. Anderson before the coal was [35] actually dumped out of the sling?

A. Yes.

Q. How long had Mr. Anderson been working on the Daisy Gray that day before he was injured?

A. Say approximately, five days.

Q. Five days? A. Five days.

Q. And how long, maybe I should say on this particular shift, Captain Bliss, do you know?

A. Five days.

Q. On this particular shift?

A. Yes, I think we started at 7:00 o'clock and worked until 12:00, came back at 1:00, five hours is right.

Mr. Pillsbury: Q. What time was the accident?

A. Approximately 1:25, between 1:25 and 1:30.

Q. P.M?

A. One P.M., I would say 1:30 P.M.; when I talked to him at the beginning—

Mr. Pillsbury: All right.

Mr. Johnson: I believe that is all.

Mr. Pillsbury: Q. Mr. Bliss, the coal belonged to the ship? A. Yes.

Q. And was to be brought on board the ship some time? A. Yes, she was. [36]

Q. And it was in a sling on the dock awaiting its being lifted on board? A. That is right.

Q. But you preferred to have it brought in by a different winch at a different hatch?

A. At a different hatch, yes, and on a different side.

Q. That is, when it was landed you wanted it landed on which side? A. Starboard.

Q. Where was it at the time of Mr. Anderson's accident?

A. On the port side. It was on the dock, but it hit Mr. Anderson on the port side, the opposite side.

Q. Do you know definitely which side it would have landed on had there been no accident? A. Yes.

Q. Which side? A. Port side.

Q. Who owned the lumber in question, the scraps?

A. Just got there from the various loads for the last 24 years.

Q. Did it belong to the Burns Steamship Company or the Daisy Gray?

A. Daisy Gray you may say, yes. There were many years accumulation.

Q. What was the coal to be used for? [37]

A. For the galley fire.

Q. On the ship? A. Yes.

Q. Both Mr. Anderson and yourself were working for the Daisy Gray or for Burns Steamship Company?

A. Yes.

Q. Is there as much differentiation in the work in loading and unloading operations of crew and longshoremen where they are all working for the same employer as there is where the ship is being loaded or unloaded by contractor, stevedore contractor?

A. That will have to be answered by someone else. On a steam schooner the sailors always have one hatch, and on off shore ones the sailors do not do longshore

work, that is on the freighters and passenger boats. On the schooners the sailors do longshoring.

Q. Part of the loading and unloading is done by the ship's crew for the lumber schooners? A. Yes.

Q. Is there any interchange of crew and longshoremen on the Daisy Gray if occasion should occur, if they are short a man on either gang?

A. If it is impossible to get longshoremen but only in case it is impossible to get them.

Q. If it develops you do not have a seaman could you [38] use a longshoreman in the same hatch?

A. No.

Q. Why not?

A. That is just one kind where you do not do it. The sailors would work short-handed. With outside help you get—well, it has not been brought up for a number of years, but they would have to use somebody extra. They could call a longshoreman if he had seaman's papers to work in there; that is all; or maybe in an emergency they could use a longshoreman to work at a certain dock, but not when you went to sea.

Q. That differentiation you say is based on the hatches the men work? A. Yes.

Q. Is there as much differentiation with references to putting commodities on board or taking off?

A. #2 is the longshoremen's hatch; #3 is the sailor's, if that is what you are getting at.

Q. You say Mr. Anderson worked at #1 hatch?

A. Yes.

Q. At the time of the accident? A. Yes.

Q. And if there were some matters of ship's stores at #1 hatch, would there be any objection to the crew bringing them on board?

A. The sailors place on board all stores, that is it [39] would be strictly the sailors' place to bring them on board.

Q. Why?

A. Well, that is part of their duties and there is usually not enough stores for the longshoremen and the crew do it.

Q. Then the shore gang on lumber do bring such stores on board at times? A. Only in off shore ships.

Q. I understood you to say that if there were not enough stores to warrant a longshore gang the seamen would bring them on board? A. Yes.

Q. But if there were enough stores then longshoremen would do it?

A. It is up to the company whether they want to use them, and they will not do that unless it is stores for several months.

Q. What difference does it make?

A. In the first place they are paying longshoremen a premium upon the time they would have to work on the cargo. The sailors are working cargo for a smaller hatch and have much more time to bring them on board, besides not having to pay the wages they have to pay the longshoremen, difference in wages, for one thing.

Q. But if it is a small matter under the situation presented, does the custom still rigorously except the one sling? [40]

A. That would be strictly a sailor operation; they would never take a longshoreman.

Q. Who owned this sling on which this coal was being brought on board? A. The ship.

Q. How much discretion ordinarily is vested in the hatch tender as to what loads to bring on board?

A. Strictly—

Q. Do you stand there and point out each load?

A. The cargo in question is coming out and is built up by the hold man down below and he in turn instructs the winch driver which way to go to handle the gear to clear the men from danger down below, and pull the load out.

Q. The hatch tender is in immediate charge of the moving of the load? A. Yes.

Q. And ordinarily within some limits would he select what loads to move first?

A. No, not necessarily; in the loads we take two from one side and two from the other side. He knows two are coming from this side and then two from this side, so he instructs the winch driver.

Q. The hatch tender?

A. The hatch tender keeps in mind and instructs the winch driver so the lumber can come off evenly. If there is [41] any question the mate is usually around where he can call and ask him.

Mr. Pillsbury: Are there any other questions of this witness? That will be all. Next witness?

HENRY TORNQUIST,

being first duly sworn, testified as follows:

Mr. Pillsbury: Q. What is your name?

A. My name is Henry Tornquist.

Q. Your address?

A. 8132 West 1st Street, San Pedro.

Q. Your occupation? A. Longshoreman.

Q. Are you a winch driver-hatch tender?

A. Yes.

Q. And were you such on the 29th of November last?

A. Yes, I was driving winch at the time of the accident.

Q. You were driving winch on the Daisy Gray at the time of Mr. Anderson's accident? A. Yes.

Q. How did the accident happen?

A. The only thing I can say, he told me to pick up the load of coal. For myself I was sitting there driving winch, the coal she back there, and I pick up and swung around, and when the load swung back it dropped down. I did not see him.

Q. He told you to place the coal on board? [42]

A. Yes, cook's coal, cook uses in galley.

Q. Were you landing the load on the port or starboard side? A. Port side.

Q. Do you know why it was landed on the port side?

A. No, he just told me to pick up load.

Q. Did he give you any signal on which side to put it?

A. No, he says bring it.

Q. Why didn't you place it on the starboard side?

A. There was gangway there.

Q. Your testimony then is that it was physically impossible to place the load on the starboard side?

A. Yes, there was gangway there. I could not get over on the starboard side.

Q. Was the port side the inbound side?

A. Yes, the ship was heading northeast and would be port side.

Q. The port side was next to the dock?

A. On the left side.

Q. Was the port side next to the dock? A. Yes.

Q. And you could not get this load over to the starboard side?

A. No, on account of the gangway there.

Mr. Tipton: Q. In your operations as winch driver, you followed the direction of the hatch tender? [43]

A. He told me what to do. If he drives then I tend hatch. We take hours.

Mr. Pillsbury: Q. Were you unloading at the time?

A. Yes, unloading lumber, low hold, #1 hatch.

Q. During the time you were unloading you brought this sling load of coal on board? A. Yes.

Q. Instead of coming back empty?

A. He told us to.

Mr. Tipton: Q. He told you to pick up the load of coal? A. Yes, the load of cook's coal.

Q. Just before he told you to bring this coal aboard had you seen him and Mr. Bliss talking?

A. Yes, they was talking after coal in #1 hatch.

Q. Could you hear that conversation?

A. No, it was too far away.

Q. Then right after that Mr. Anderson told you to bring the coal aboard?

A. Yes, I picked the coal up.

Mr. Tipton: I think that is all.

Mr. Pillsbury: Mr. Johnson?

Mr. Johnson: Q. At the time just before you picked up the coal, Mr. Tornquist, you had landed a load of lumber?

A. Yes, on the rooster; then I picked up the coal.

Q. You say from where you were sitting you could not see [44] Mr. Anderson when he was hit?

A. No, I was sitting when the coal went backward like that, I could not see nothing, and then I pick up a load and take a swing, only keep my eyes on the load to see where she was going (indicating).

Q. You say when you pick up a load of coal you keep your eyes on it?

A. Yes, on the lumber too, always face.

Q. You have loaded coal on lumber schooners before?

A. Yes, I took lots of cook's coal before.

Q. Had you loaded coal on board the Daisy Gray before? A. Oh, yes, off and on.

Mr. Pillsbury: Q. You were a longshoreman at the time, not a member of the crew?

A. No, longshoreman, winch driver.

Mr. Johnson: That is all.

Mr. Pillsbury: Q. Do you know where this coal was to be stowed?

A. I know. He never told me anything about it.

Q. Do you know where the coal was going?

A. Back aft, underneath #2 gear.

Q. Near the ship galley?

A. No, the ship is like this (indicating).

Q. Where is the coal after it is landed?

A. Underneath the #2 winch on starboard. [45]

Q. How does it get there after it is brought on board the ship?

A. You rig up #2 gear and take some aboard; leave some coal and take some on top deck.

Q. How is it carried up there?

A. Pull it up by the hands, got little rigging, pull it by hands (indicating).

Q. Is there any great difference in the final storage whether it is brought in at #1 or #2?

A. If he had done it safely we would have landed it by gear. We always took it out of #2 gear.

Q. You heard the testimony of the ship's mate that the crew always take coal aboard?

A. Sometimes the crew takes it aboard, sometimes the longshoremen, if the crew is busy with their hatch and the longshoremen get through before. Generally you take on board the ship stores with the longshore gang on board the ship if the sailors are behind.

Q. Were the sailors working hatch?

A. Yes, #3 at the back end.

Q. Was anybody working at #2?

A. No, they were all through.

Q. Who had worked at #2 last?

A. Longshoremen.

Q. Was it much more unhandy to move the coal from #2 to [46] #1?

A. You load all stores, or baggage, land it.

Q. Was it handier to get it back to the galley from #2 hatch, than from #1?

A. If he took it as we handled it and took it aboard and laid the load on the four-wheeler.

Q. By four-wheeler you mean a little truck?

A. Four wheels. A little buggy they load lumber on.

Q. What I am trying to get at is whether the coal was landed at #2 or #1, would it still be moved back on a four-wheeler?

A. No. The only way to handle the load is to take it over the side on the starboard. The load was lying on the port side, and the coal is supposed to go on the starboard. The only way to get it was to pack it to #2 gear and to place it on starboard side. This is the port side. This is starboard side (indicating).

Q. Did Mr. Anderson tell you how he was going to get the coal from #1 gear over to #2?

A. No, he told me to pick up and swing.

Q. Do you know how he was going to get it over?

A. The only way we could, with a fore and aft swing.

Q. With #1 gear? A. Yes.

Q. Could it be swung back to #2 gear with #1 gear? [47]

A. No. The load was so low down if I swing back it would tear the hatch off.

Q. After that coal got where it landed by #1 gear, how could it have been moved back to where it was going to be laid? A. Wait for the sailors to rig the gear.

Q. You have to rig #2 gear?

A. Yes. So when the load was landed the sailors took it over to the starboard side.

Q. With #2 gear?

A. Yes. So I do not see the reason why he lifted the coal myself.

Q. Now it was still in the sling at the time?

A. Oh, yes, the fellow brought it.

Q. If it were taken out of the sling how would it be handled?

A. Have to put it on the ropes then.

Q. I do not quite get the picture yet.

A. He could have dumped the coal on the dock and took it on the ropes.

Q. The coal was in a sling on the dock?

A. Yes.

Q. And it could have been picked up by #1 or #2 gear? A. Yes.

Q. But there was nobody at #2 gear at the time?

A. No, sir. [48]

Q. Could it have been picked up by #3 gear?

A. Yes, but they have to take it back and roll it forward.

Q. Would the boom from #3 reach that coal on the dock? A. Not the boom, wing.

Q. #3 boom could not have reached it?

A. No, no, #3 gear.

Q. So the sling load of coal on the dock could not have been reached by the #3 gear? A. No.

Q. Only by #1 or #2? A. Yes.

Q. Could it have been reached at the time by both #2 or #1?

A. You can reach it with #1 and #2, yes. We use the #1.

Q. How long would it take to rig up #2 gear?

A. Maybe 20 minutes.

Mr. Pillsbury: Mr. Johnson, any questions?

Mr. Johnson: Q. Ordinarily you would have picked that load of coal up on the dock and laid it down when you got the signal to lay it down? A. Nobody—

Q. You had not got his signal yet? A. Yes.

Q. You were moving it over prior to the time you laid it down when Mr. Anderson got hit? [49]

A. You swing it this way and then back, when that went back there I did not see him (indicating).

Mr. Pillsbury: Q. If the coal were to be landed on the port side of the deck by your #1 gear, could it have been picked up by #2 gear? A. Yes.

Q. #2 could reach it from the deck of the ship?

A. Yes, they picked up and brought it over the star-board side,

Q. You don't know whether you were just going to set it on the deck and leave it in the sling so #2 could pick it up, or whether you were going to dump it out of the sling?

A. No, I do not know what he was going to do with the sling.

Q. As I understand it, ordinarily if you are going to dump a sling of coal you would land and then unhook one side and you pull the sling out from under it?

A. Yes.

Q. Or can you take out your hooks and leave the coal on the sling? A. Yes.

Q. If you had done that you could come along with #2 winch and pick up your sling and move it?

A. Oh, yes, if #2 gear was rigged up you would not need to pull around with #1 gear.

Q. It was not rigged up? [50]

A. No, the boom was like this (indicating).

Q. Was there any other way of getting the coal back to where it was to be stowed except by using #1 or #2 gear? A. Put on the shoulders and pack.

Q. Was there anybody who could pick it up and pack it?

A. No, only the mate there, except the gang up from the hold, the sailors.

Mr. Pillsbury: All right.

Mr. Tipton: That is all.

Mr. Johnson: Q. You were winding up the job?

A. Yes.

Q. You had the boat loaded?

A. Well, we had about four hours left. After he was killed we worked until 4:00 o'clock, and that was at 1:30, something like that.

Mr. Johnson: That is all.

Mr. Pillsbury: That is all.

Mr. Tipton: I will recall Mr. Bliss for just one question.

ERNEST L. BLISS,

having been previously duly sworn, testified as follows:

Mr. Tipton: Q. Mr. Bliss, in order to put that coal where it belonged it would have been necessary to have rigged #2 regardless of whether the coal was on the dock or the vessel?

A. Unless you wanted the sailors to pick it up and carry it from #1 to #2, over to the starboard side. [51]

Q. What was your intention insofar as loading this coal was concerned?

A. I intended to take the sailors after they finished #3 and wing it out with #2 gear.

Mr. Pillsbury: Q. How does the coal get back from the offshore spot?

A. It is taken by the sailors with the gear from the dock, #2 gear, over to the starboard side, then some is unloaded by the sailors by hand and carried a few feet on the platform, and some is taken by the hand billy about 15

feet hand over hand to the saloon deck, about 18 sacks. We take half and half for the saloon deck and in the galley; that is common practice.

Mr. Pillsbury: Are there any other questions?

Mr. Tipton: That is all.

The Witness: I would like to say one more thing. The longshoremen, as he stated, do sometimes occasionally hook onto something and bring it on board ship but when they bring it on board they land it, but the sailors always take it and store it. The sailors will finish storing it; they only bring it on board the ship.

Mr. Tipton: No further questions.

Mr. Pillsbury: Mr. Johnson?

Mr. Johnson: No.

Mr. Pillsbury: All right. [52]

Mr. Tipton: May Mr. Bliss and Mr. Tornquist be excused.

Mr. Pillsbury: Yes. Next witness?

Mr. Tipton: That is all we have.

(Discussion off the record.)

Mr. Johnson: I would like two weeks, Mr. Pillsbury.

Mr. Pillsbury: Do you want another hearing, Mr. Johnson?

Mr. Johnson: Yes. I do not wish to close at this time.

Mr. Pillsbury: Shall I definitely reset it now? I will be here again in four weeks.

Mr. Johnson: I would like it set when you are here.

Mr. Pillsbury: Continued for four weeks, or thereabouts, to my next trip to Wilmington. That will be all for today.

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken in the above matter at the hearing held on December 16, 1947.

HELEN G. SCHULKE,

Reporter [53]

EXHIBIT A

[Crest]

ASSOCIATED INDEMNITY CORPORATION

111 West Seventh Street Los Angeles 14, California

Head Office: San Francisco

Employer John A. Anderson Injured.....

Date last worked November 29, 1947 Date of accident November 29, 1947

registered long- (\$1.57 Per hour
Injured was ~~Steady~~ shoreman em- (\$..... Per day
~~Extra~~ ployee working (\$..... Per week
at the rate of (2.355 O. T.

Number of days constituting a working week 5

Number of hours constituting a working week 40

Dates injured was employed by you: From.....,
19....., to....., 19.....

Note: If injured's wages varied in amount from week to week, complete the following report of 52 weeks' earnings.

Week Month				Number
Week	From	To	Amount	of days
No.	Date	Date	Paid	worked
	December '46	November '47		
1				
2	December		494 46	
3	January		428 57	
4	February		187 20	
5	March		329 18	
6	April		372 11	
7	May		224 70	
8	June		225 03	
9	July		379 14	
10	August		206 45	
11	September		326 28	
12	October		125 29	
13	November 29th		318 72	
*	*	*	*	*

Total Carried Forward \$3,617 13

[Written]: 12-11-47 [Illegible]

* * * * * * *

I certify that the above is a true copy of payroll record of Injured's earnings as shown on Employer's records.

Signed WATER FRONT EMPLOYERS
ASSN.

By Gary S. Banos

Supervisor of Records Department [54]

[Written]: Filed 12-23-47 M. L.

[Stamped]: Received Dec 23 1947 District No. 13.

[Endorsed]: 8075-BH. Filed Aug. 7, 1948. Edmund L. Smith, Clerk. [55]

[Title of District Court and Cause]

NOTICE OF MOTION FOR SUMMARY JUDG-
MENT FOR PLAINTIFFS AND MOTION FOR
SUMMARY JUDGMENT AND POINTS AND
AUTHORITIES

To Johnson & Kaplan, 704 S. Pacific Ave., San Pedro,
Calif., as Attorneys for Defendant Anna Anderson:

To James M. Carter and Leila F. Bulgrin, as Attorneys
for Defendant Warren H. Pillsbury:

You and Each of You Will Please Take Notice that
plaintiffs will move the Court for summary judgment,
pursuant to Rule 56, F. R. C. P., before the Hon. Ben
Harrison, Judge, in his courtroom at 312 N. Spring St.,
Los Angeles 12, on Tuesday, September 7, 1948, at 10
a. m. or as soon thereafter as counsel can be heard.

Dated: August 17, 1948.

SYRIL S. TIPTON and
PATRICK H. FORD

By Patrick H. Ford

Attorneys for Plaintiffs. [56]

MOTION FOR SUMMARY JUDGMENT

Now come the plaintiffs, by their attorneys Syril S. Tipton, Esq. and Patrick H. Ford, Esq., and move the Court for Summary Judgment for plaintiffs and against defendants and each of them, for the following reason, to wit:

I.

That defendants have, and each of them has, no defense upon the merits to said action and it is clear on the record that the award is against the law.

This motion will be based upon the records, files, and pleadings herein and upon the Memorandum of Points and Authorities annexed hereto and the Memorandum of Points and Authorities filed by plaintiffs in opposition to defendant Pillsbury's motion to dismiss or for summary judgment.

Dated: August 17, 1948.

SYRIL S. TIPTON and
PATRICK H. FORD

By Patrick H. Ford

Attorneys for Plaintiffs. [57]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 18, 1948. Edmund L. Smith,
Clerk. [58]

[Title of District Court and Cause]

STIPULATION

It is hereby stipulated by and between the above named parties by and through their respective counsel that the Transcript of Testimony at Hearing heretofore filed in the records of this case on August 7, 1948, shall be deemed to be a part of both the Plaintiffs' Motion for Summary Judgment filed August 18, 1948, and the Defendant's Motion to Dismiss or for Summary Judgment filed on August 7, 1948.

Dated: This 20 day of August, 1948.

SYRIL H. TIPTON and
PATRICK H. FORD

By Patrick H. Ford
Attorneys for Plaintiffs
and

JAMES M. CARTER
United States Attorney
CLYDE C. DOWNING

Asst. U. S. Attorney
By Leila F. Bulgrin
Asst. U. S. Attorney
Attorneys for Defendant, Warren H. Pillsbury.

It is so ordered.

BEN HARRISON
United States District Judge.

[Endorsed]: Filed Aug. 20, 1948. Edmund L. Smith,
Clerk. [59]

[Title of District Court and Cause]

STIPULATION FOR CONTINUANCE AND RE
TRANSCRIPT

It Is Stipulated that the plaintiff's motion for summary judgment, heretofore set for September 7, 1948, may be continued to or reset for Monday, September 13, 1948, at 11 a. m. in the Courtroom of Judge Harrison.

It Is Further Stipulated that the Transcript of Testimony at the hearing before defendant Pillsbury, heretofore filed, shall be deemed a part of plaintiffs' motion for summary judgment.

Further notice of said hearing is waived.

Dated: August 20, 1948.

SYRIL S. TIPTON and
PATRICK H. FORD

By Patrick H. Ford

Attorneys for plaintiffs.

JOHNSON & KAPLAN

By Harry A. Kaplan

Attorneys for Def't Anderson.

JAMES M. CARTER and

LEILA F. BULGRIN

By Leila F. Bulgrin

Attorneys for Def't Pillsbury.

It is so ordered.

Date: Aug. 26, 1948.

BEN HARRISON

Judge.

[Endorsed]: Filed Aug. 26, 1948. Edmund L. Smith,
Clerk. [60]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 8075-BH Civil

BURNS STEAMSHIP COMPANY, a corporation,
et al.,

Plaintiffs,

vs.

WARREN H. PILLSBURY, etc., et al.,

Defendants.

JUDGMENT

The Motion of plaintiffs for Summary Judgment and the Motion of Defendant, Warren H. Pillsbury, for summary judgment or to dismiss having come on regularly before the Court on September 13, 1948, to be heard and the court having denied the plaintiffs' Motion for Summary Judgment and granted the Motion of the defendant, Warren H. Pillsbury, for Summary Judgment, it is therefore, this 1st day of October, 1948,

Ordered, Adjudged and Decreed that the plaintiffs' Motion for Summary Judgment is denied, and the defendant, Warren H. Pillsbury's Motion for Summary Judgment is hereby granted, and plaintiffs take nothing by way of their Complaint.

BEN HARRISON

United States District Judge.

Judgment entered Oct. 1, 1948. Docketed Oct. 1, 1948. Book 53, page 116. Edmund L. Smith, Clerk; by C. A. Simmons, Deputy.

[Endorsed]: Filed Oct. 1, 1948. Edmund L. Smith, Clerk. [61]

United States District Court
Southern District of California
Central Division

NOTICE BY CLERK OF ENTRY OF JUDGMENT

Syril S. Tipton and
Patrick H. Ford, Esqs.
Attorneys at Law
210 West 7th St., (Room 907)
Los Angeles 14, California

Johnson and Kaplan, Esqs.
Attorneys at Law
704 South Pacific Ave.
San Pedro, California

James M. Carter, Esq.
United States Attorney
(Attn: Leila F. Bulgrin, Asst.)
600 Federal Bldg.
Los Angeles 12, California

Re: Burns Steamship Co., a corp., et al. v.

Warren H. Pillsbury, etc., et al., No. 8075-BH

You are hereby notified that Judgment has been entered
this day in the above-entitled case, in Judgment Order
Book No. 53, page 116.

Dated: Los Angeles, California, October 1, 1948.

EDMUND L. SMITH

Clerk

By C. A. Simmons

Deputy Clerk [62]

[Title of District Court and Cause]

NOTICE OF APPEAL BY PLAINTIFFS

Notice is hereby given that the plaintiffs Burns Steamship Company, a corporation, and Associated Indemnity Corporation, a corporation, hereby appeal to the United States Court of Appeals, Ninth Circuit, from the judgment entered October 1, 1948, in Judgment Order Book No. 53, page 116, and from the orders made on September 13, 1948, denying the plaintiffs' motion for judgment and granting the defendant Pillsbury's motion for judgment.

Dated: November 5, 1948.

SYRIL S. TIPTON

TIPTON & WEINGANG and

PATRICK H. FORD

By Patrick H. Ford

Attorneys for Plaintiffs and Appellants

[Endorsed]: Filed & mld. copy to Jas. M. Carter, U. S. Atty., et al., Attys. for Defts., Nov. 5, 1948. Edmund L. Smith, Clerk. [63]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 66, inclusive, contain full, true and correct copies of Complaint for Injunction; Answer of Defendant Anna Anderson; Notice of and Motion to Dismiss or for Summary Judgment of defendant Pillsbury; Transcript of Testimony at Hearing before the Commissioner; Notice of and Motion for Summary Judgment of Plaintiffs; Stipulations and Orders filed August 20 and 26, 1948 respectively; Judgment; Notice of Entry of Judgment; Notice of Appeal and Designation of Record on Appeal which, together with copy of reporter's transcript of proceedings on September 13, 1948, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$14.90 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 13th day of December, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

[Title of District Court and Cause]

Honorable Ben Harrison, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, September 13, 1948.

Appearances:

For the Plaintiffs: Cyril S. Tipton and Patrick H. Ford.

For the Defendants Pillsbury, etc.: Clyde C. Downing and Leila F. Bulgrin, Assistant United States Attorneys.

For the Defendant Anna Anderson: Johnson and Kaplan.

Los Angeles, California, September 13, 1948,
10:00 O'clock A. M.

The Court: This is a motion for summary judgment. I feel the matter is entitled to a liberal interpretation. In the last 10 or 12 years there has been a definite tendency toward liberality in such an interpretation, to take care of the injuries in industry. As I understand the claim, it was not in the course of his employment but apparently one of your main points as to the sufficiency of the evidence is that he was using a different instrumentality than he was requested to use. I therefore feel that it was outside of his employment.

Mr. Ford: He was using the instrumentality he was to use, but using it for his own purposes.

The Court: The Commissioner found that he was requested not to do so. He was not ordered to do so.

Mr. Ford: The Commissioner found that it was a disobedience.

The Court: I am going to interpret it liberally.

Mr. Ford: It is our contention that it is the purpose of the act—

The Court: I have examined the transcript. I think the Commissioner's findings are supported by the evidence. I don't think a set of facts such as appear here should deprive a workman of his compensation insurance. I don't think it [2*] was the intention of Congress to place matters on that strict a basis. The cases you cite are where he left the barge, the place of his employment. They are distinguished from this case. The motion of the defendant Warren H. Pillsbury for summary judgment is therefore granted.

*Page number appearing in original Reporter's Transcript.

[Endorsed]: Filed Dec. 9, 1948. Edmund L. Smith, Clerk. [3]

[Endorsed]: No. 12127. United States Court of Appeals for the Ninth Circuit. Burns Steamship Company, a corporation, and Associated Indemnity Corporation, a corporation, Appellants, vs. Warren H. Pillsbury, Deputy Commissioner 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency and Anna Anderson, Appellees. Transcript of Record. Appeal From the United States District Court for the Southern District of California, Central Division.

Filed December 14, 1948.

PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12127

BURNS STEAMSHIP COMPANY and ASSOCI-
ATED INDEMNITY COMPANY,

Plaintiffs and Appellants,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner,
13th Compensation District, Bureau of Employees Com-
pensation, Federal Security Agency, and ANNA AN-
DERSON,

Defendants and Appellees.

STATEMENT OF POINTS UPON WHICH APPEL-
LANTS INTEND TO RELY, AND DESIGNA-
TION OF RECORD TO BE PRINTED.

Come now the appellants and make the following state-
ment of points upon which they intend to rely upon this
Appeal, to wit:

1. The injury sustained by decedent John A. Ander-
son, which resulted in his death, did not arise "out of and
in the course of employment" within the meaning of 33
U. S. Code 902.

2. The violation of an employer's lawful order, by an
employee, for his own benefit or that of a stranger,
amounts to a "frolic and detour," which removes the em-
ployee from the course of employment.

3. Plaintiffs were entitled to Summary Judgment
against defendants and their motions should have been
granted.

4. Defendant Pillsbury's motion for Summary Judg-
ment should have been denied, and the said judgment
should be reversed.

DESIGNATION OF RECORD TO BE PRINTED

Appellants designate for printing the entire record to be filed in the United States Court of Appeals, except

* * * * *

Dated: December 10, 1948.

TIPTON & WEINGAND

By Cyril S. Tipton

Attorneys for Plaintiffs and Appellants.

Received copy of the within Statement of Points Upon Which Appellants Intend to Rely, and Designation of Record to be Printed, this day of December, 1948. James M. Carter, U. S. Attorney; Leila F. Bulgrin, Assistant; by Gertrude M. Johnson.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 14, 1948. Paul P. O'Brien, Clerk.

